UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABRIOLA BAKING COMPANY, EMPLOYER, **AND** **JUVENTINO SILVA, PETITIONER,** **AND** **TEAMSTERS LOCAL 734, UNION.**	**CASE NO. 13-RD-089891**

EMPLOYER'S RESPONSE IN OPPOSITION TO THE UNION'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTIONS

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I. INTRODUCTION AND PROCEDURAL HISTORY

Labriola Baking Company ("Labriola" or "Company") bakes fresh artisan bread daily. (Tr. 136). The business runs seven days a week and serves approximately one thousand customers in the greater City of Chicago. (Tr. 136). Labriola employs approximately 40 drivers who drive 26 routes to deliver its fresh breads, rolls and pastries. (Tr. 137). Labriola also has a rapidly growing frozen business that ships internationally. (Tr. 137).

Teamsters Local 734 ("Union") was certified as the exclusive collective-bargaining representative for all full-time and regular part-time route sales drivers and relief sales drivers employed by Labriola at its facility located at 3701 West 128th Place, Alsip, Illinois on September 21, 2011. (Jt. 1). Petitioner Juventino "Juan" Silva ("Petitioner") filed a signed RD petition on September 25, 2012. The Parties stipulated to the election, and the stipulated election was held on March 14, 2013. (Tr. 140). As per the stipulation, the election was held in the front office of Labriola's facility at 3701 West 128th Place, Alsip, Illinois. (Jt. 3; Tr. 140). The votes were counted on the same day, and the Union was voted out with a vote of 20 to 16.[1]

On March 21, 2013, the Union filed four objections ("Objections") related to alleged conduct of the Company during a meeting on March 7, 2013 and on the day of the election, March 14, 2013. This matter came before Hearing Officer Renee McKinney on April 23, 2013, at which point the Union dropped one of its original Objections. On June 10, 2013, the Hearing Officer issued her Report on Objections (the "Report"), recommending that all of the Union's Objections be overruled and that a Certification of Results issue. (Report at 22). On June 24, 2013, the Union filed Exceptions to the Hearing Officer's Report, in which it takes exception to two of the three objections submitted to the Hearing Officer (Objections 1 and 3). ("Union Exceptions").

[1] Four ballots were challenged, but, since they were not outcome determinative, they were not opened.

Thus, of the four Objections the Union originally raised, only two are before the Board. (*See* Union Exceptions). The Union claims that, during a meeting on March 7, 2013 attended by members of management and bargaining unit employees, Labriola's Chief Operating Officer Rob Burch:

> (1) Told employees that if the employees supported the [Union] in the March 14th election, the Employer would cause the employees to engage in a strike and the Employer would hire a legal workforce. The Union contends that this statement, if made, conveyed to employees that the Employer would report employees to immigration if they voted for the union or engaged in a strike;
>
> (3) Told employees that if they supported the Union in the election and the Union continued to represent them, the Employer would not change its existing health insurance policies. . . The Union contends that this statement informed employees it would be futile to support the Union in the election and retain the Union as their bargaining representative. The Union maintains that through this conduct the Employer engaged in pre-election conduct that had the tendency to interfere with employee free choice.

(Tr. 7-8).

Labriola submits the instant response in opposition to the Union's Exceptions and in favor of affirming the Hearing Officer's Report.

II. FACTS

A. The March 7th Meeting

On March 7, 2013, Labriola held a meeting during which the Union election was discussed, among other topics. (Noe Ornelas 16, 17). The meeting took place in a room next to the lunchroom around 11:15 a.m. (Ornelas, 17). Burch attended for the Company, along with Rich Labriola, the Company President, Dave Hudson, Brad Bettenhausen, and Manuel ("Manny") Rojas. (Ornelas 17). Somewhere between 22 and 36 drivers were in attendance. (Ornelas 18; Raul Flores 65). Burch and Labriola spoke in English, and Rojas provided the

Spanish translation. (Ornelas 18). Rojas' translation was perceived to be accurate by the bi-lingual speakers in attendance. (Ornelas 19).

Both Union and Company witnesses alike testified that Burch read from a prepared speech in his hands. (Fructoso Aviles, 96); (Juan Espinoza, 104); (Brian Brown, 108); (Juan Silva, 118, 123-124); (Burch, 147); (Manuel Rojas, 179); (Ornelas, 193). Rojas prepared a translated copy of Burch's remarks for use during the meeting. (Co. Ex. 5, Tr. 179-181).

1. Statements Regarding Health Insurance

The meeting started with potential investor Bob Parnow talking about his interest in the Company. (Ornelas 19, Flores 66). Burch then spoke on behalf of Labriola and addressed the upcoming Union election. Burch said that he believed the answer regarding the Union should be "No." (Ornelas 19). He also provided some of the logistical details related to the election, including the date and times for voting. (Ornelas 19). Burch broached the issue of the Union's proposal regarding its health and welfare plan and stated that the Company was not "interested in it [the Union's plan]" due to the cost. (Ornelas 19-20; Burch 155-156). Burch's full statement on the topic was:

> As far as healthcare goes, we have told the Union that, because of cost considerations and our need to remain competitive with Z Baking, the Company is not interested in agreeing to the Union's health & welfare plan. The fact is, while we have and will bargain in good faith, the Union cannot force Labriola to agree to this proposal or any other.

(Co. Ex. 2; Burch 155-156).

An identical statement was contained in a letter sent home to the drivers after the meeting. (Co. Ex. 3, Tr. 149-150, 166). Labriola President Rich Labriola also spoke on the Company's position on the Union's health and welfare proposal during the meeting. Labriola said "he cannot promise [the drivers] health and welfare, he can't afford it." (Ornelas 21).

2. Statements Regarding Strikes

Burch also addressed the prospect of a strike. (Tr. 20, Tr. 151). The script from which Burch read expressly addressed the topic of what would happen in the case of a strike. (Co. Ex. 2). In full, Burch stated:

> [I]f you choose Union representation, we believe the Union will push you towards a strike. Should this occur, we will exercise our legal right to hire replacement workers for those drivers who strike.

(Co. Ex. 2, Tr. 151).

Burch's comments were then translated by Rojas for the Spanish speakers. (Tr. 183). When Rojas translated Burch's comments, he testified that he removed the word "legal" from the translation. (Tr. 183). Rojas translated this statement into Spanish as "the Company had the right to replace workers who decide to go on strike," without use of the word "legal." (Rojas, 183). At no point during the meeting did anyone mention immigration, immigration authorities, or ICE. (Burch 151); (Espinosa 101); (Brown 108); (Silva 120); (Bob Esposito 131); (Rojas 182). Burch did not say that the employer would hire a "legal workforce." (Tr. 151-152,182).

III. LEGAL STANDARD FOR EVALUATING THE UNION'S EXCEPTIONS

The law is unequivocal that "representation elections are not lightly set aside." *See e.g. Delta Brands, Inc.,* 344 NLRB 252, 252-253 (2005). As explained in *Delta Brands*, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one . . . The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit." *See also Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000). The test to be applied when considering objections is an objective test: whether "the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Manufacturing*, 316 NLRB 716 (1995); *Taylor Wharton Division Harsco Corporation*, 336

NLRB 157, 158 (2001). As the objecting party, the Union has the burden of proof and must prove that the conduct occurred as alleged, and that it affected employees in the unit.

In the Union's Exceptions, the Board should consider that the Union did not object to the comments made during the March 7, 2013 meeting until well after the Union had been unsuccessful in the election. No unfair labor practice charge was filed related to that meeting until after the Union lost the election, permitting two weeks for introspection after the meeting. *See Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 185 (2d Cir. 1989) (noting that when voters claimed that their votes were tainted after the chance for post-election introspection, the claims were not persuasive).

IV. THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS SHOULD BE UPHELD

A. The Use of the Phrase "Legal Workforce" or "Legal Workers" Did Not Constitute a Threat to Report to Immigration Authorities

Choosing to consider the evidence in the "Union's best light," the Hearing Officer found that Rojas, in translating Burch's prepared remarks, "converted 'legal right to hire replacement workers' to 'legal workforce' or 'legal workers.'" (Report at 8-9). The reference was made, according to the Hearing Officer, "in the context of what action the Employer would take in the event that the Union went on strike." (Report at 9). Nonetheless, the Hearing Officer found that Rojas' reference to hiring "legal workers" as replacements in the event of a strike did not constitute a threat to report employees to immigration authorities. (Report at 9-10). In that regard, the Hearing Officer reasoned that no one from Labriola made any reference to employees' legal status, and "the Union has cited no Board case where the reference to employees' legal status is as attenuated as it is here, nor have I located one." (Report at 10).

In its Exceptions, the Union argues that the Hearing Officer should have found that, based upon the use of the phrase "legal workers" or a "legal workforce," Burch "threatened

employees that if they voted for the Union, and engaged in protected concerted activity, the Employer would take steps to report them to immigration authorities." (Exceptions Brf. at 3). There is no legal or factual basis to read so much into either innocuous phrase, and the Hearing Officer was right to reject the Union's argument in this regard.

As an initial matter, the Union repeatedly attributes the phrase "legal workers" or a "legal workforce" to Burch. (Exceptions Brf. at 3-4). This is inconsistent with the Hearing Officer's factual findings. She determined that Burch read from his prepared script and did not use either phrase. (Report at 5-6). Rather, the Hearing Officer found that it was Rojas, the translator, who inadvertently "converted 'legal right to hire replacement workers' to 'legal work force' or 'legal workers' during his contemporaneous translation of Burch's remarks." (Report at 8). The Union offers no basis for disturbing this factual finding. The Board's established policy is not to overrule credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd*. 188 F.2d 362 (3d Cir. 1951). The Union cannot meet this standard.

While Labriola does not contest the Hearing Officer's finding that Rojas was Burch's agent for the purpose of this meeting, Rojas' use of the phrase in question should be viewed in the overall context of Burch's remarks. *See Mediplex of Danbury,* 314 NLRB 470, 471 (1994) (Board considers the totality of the relevant circumstances). In other words, Rojas did not use this phrase by design or with any invidious intent. As the Hearing Officer reasoned, the use of the phrase was simply the result of "difficulty distinguishing the concepts" in the course of a contemporaneous translation. (Report at 8).

In any event, there is no Board authority to support the Union's attempt to connect this phrase with a threat. The three cases cited by the Union – *Viracon Inc.*, 256 NLRB 245 (1981);

QSI, Inc, 346 NLRB 1117 (2006); and *JPH Management, Inc.*, 342 NLRB 520 (2004) – all involved either an explicit threat to report an employee to immigration authorities, an explicit reference to an employee's legal status and immigration authorities, or both:

- In *Viracon*, a Production Manager approached a number of employees of Mexican descent "concerning the possibility that they might be reported to the Immigration Service should the Union be successful. 256 NLRB at 246.[2] The Board further noted that: "These threats, according to the credible testimony of employee witnesses, encompassed both statements that if the Union won, Respondent would report illegal aliens to immigration, and that the Union would not allow individuals without documentation to work in the plant if it got in." *Id.* at note 7.

- In *QSI, Inc.*, managers told employees that "immigration was outside," that "immigration was coming," and that they were going to report employees to immigration. 346 NLRB at 1124-1125.

- In *JPH Management*, a director for the employer told an employee that the employee did not have immigration papers, that the director had helped the employee's friends, and that the employee needed to help the director (by signing a decertification petition). 342 NLRB at 524. The employee responded that if the director wanted to call INS, it was her business. *Id.*

There is simply no connection between these factual scenarios and Rojas' inadvertent use of the phrase "legal workers" or a "legal workforce" without any reference to immigration authorities or employees' immigration status.

The Union argues that "nothing in Board lexicology substitutes the term 'legal workforce' for replacement workers." (Exceptions Brf. at 4). However, the Hearing Officer did not find that this phrase was used as a substitute. Rather, it was used in the context of describing who the replacement workers would be. (Report at 9-10).

[2] The Union cites *Viracon* for the proposition that it need not demonstrate that any of the employees were actually illegal aliens to establish that a "sufficiently coercive" threat was made. (Exceptions Brf. at 4). However, in *Viracon*, the evidence established that the employees were "of Mexican descent." 256 NLRB at 246. In the present case, the evidence only demonstrates that employees were "Spanish speaking." (Report at 3). The Union cites no legal authority for the proposition that an employee who is "Spanish speaking" is necessarily worried about immigration authorities.

The Union takes issue with this credibility finding, arguing that Union witnesses did not testify that the word "replacement" or "replace" was used. (Exceptions Brf. at 3). This omission is insufficient grounds to second-guess the Hearing Officer's factual findings. *See Standard Dry Wall Products*, 91 NLRB at 544. After all, no Union witness denied that the word "replacement" or "replace" was used. Moreover, the Hearing Officer found that Burch *did* reference "replacement workers," because he read from his prepared script, and that Rojas used the word as part of his translation. (Report at 5-6, 8-9). In any event, the fact that the Board may not have recognized "legal workforce" or "legal workers" as a legal term of art does not mean that either phrase is somehow a "code" for threatening to report employees to immigration authorities.

The Union also argues that the phrase "legal workforce" or "legal workers" has garnered "wide spread acceptance" in the national debate surrounding immigration reform. (Exceptions Brf. at 4-5). In support, the Union notes that Secretary Janet Napolitano of the U.S. Department of Homeland Security used the phrase, "legal workforce," three times when testifying before Congress on April 23, 2013. (Exceptions Brf. at4-6). The Union did not raise this argument before the Hearing Officer, notwithstanding the fact that Secretary Napolitano's testimony was given prior to the submission of post-hearing briefs. It has therefore waived this argument. *Auto Workers Local 594 v. NLRB*, 776 F.2d 1310, 1314 (6th Cir. 1985) ("Since the Union failed to raise this issue in a timely fashion before the ALJ, we hold that it waived this defense."), *enf'd.* 272 NLRB 705 (1984); *Wal-Mart Stores Inc.,* 394 NLRB 1095, 1096, at n. 7 (2007), *citing Detroit Newspapers*, 327 NLRB 299 (1999), *affd. in relevant part* 216 F.3d 109 (D.C. Cir. 2000) (finding that "the General Counsel did not make this argument to the judge. The argument is therefore untimely, and we do not consider it."); *ATC/Forsythe & Assocs., Inc*., 341 NLRB 501, 501 n. 1 (2004) (granting motion to strike arguments in charging parties' exceptions that went

beyond the General Counsel's theory of the case); *International Paper Co.,* 319 NLRB 1253, 1276 (1995) (arguments "not considered by the administrative law judge" are "inappropriate to be considered for the first time upon exceptions to the Board."); *Met West Agribusiness, Inc*., 334 NLRB 84, 88 (2001) (affirming ALJ who stated determining an issue "raised for the first time as a post-hearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense" where General Counsel sought to amend the complaint in his post-hearing brief); *Yorkaire, Inc.,* 297 NLRB 401 (1989), *enf'd.* 922 F.2d 832 (3rd Cir. 1990); *TLI, Inc*., 271 NLRB 798, 805-06 (1984) (affirming ALJ's rejection of remedy not alleged in complaint or raised until close of hearing and in post-hearing brief, where ALJ found the "fundamental question" is "whether in fairness it can be said that the Respondents had sufficient notice of this matter to prepare an adequate defense"), *enf'd* 772 F.2d 894 (3d Cir. 1985).

Even if the Board were to consider Secretary Napolitano's testimony, it does not support the Union's theory. First, one official's use of a phrase three times in the course of one day does not equate with "wide spread acceptance." Second, the Secretary's use of this phrase occurred long after the March 7 meeting at issue. Thus, whatever meaning may have attached to this phrase as of April 23rd would have no bearing on Rojas' inadvertent use of the phrase over one month earlier. Third, the fact that Secretary Napolitano used the phrase "legal workforce" to describe employees who are legally authorized to work in the United States does not somehow infuse that phrase with a secret objective meaning that an employer who also uses this phrase is going to report current employees to immigration authorities. The Union offers no legal authority suggesting the contrary.

For all of the reasons stated above, the Board should reject the Union's Exceptions to Objection Number 1 and sustain the Hearing Officer's Report and recommendations.

B. The Company's Statements Regarding Healthcare Were an Accurate Summary of the Current Status of Negotiations and the Company's Position

The Hearing Officer found that Burch read from his prepared script during the March 7 meeting when discussing the current status of negotiations with respect to wages and benefits. (Report at 13-14). In that regard, Burch stated, in part:

> In September 2011, you elected the union based on their promises of a contract with better wages and benefits. That was 18 months ago. And I know that the Union continues to visit your homes making even more **promises.** While this has continued, Labriola has bargained in good faith, the union has still not shown you a contract, and your wages and benefits have not changed.
>
> * * * * * *
>
> As far as healthcare goes, we have told the union that, because of cost considerations and our need to remain competitive with Z Baking, **the Company is not interested in agreeing to the union's health & welfare plan.** The fact is, while we have and will bargain in good faith, **the union cannot force Labriola to agree to this proposal or any other.**

(Report at 13-14; Co. Ex. 2) (emphasis in original). Burch also read from a chart which detailed the Company's most recent proposal to the Union to decrease wages by $50.00 per week; to decrease commission rates; and to maintain existing health & welfare and pension benefits. (*Id.*). Considering the totality of Burch's remarks, the Hearing Officer found that they were accurate representations of the status of bargaining and the law and overruled the Union's objection. (Report at 15-16).

In its Exceptions, the Union argues that Burch's comments, as detailed above, "effectively told employees that even if they supported Local 734 in the March 14 election, and Local 734 continued to represent them, there would be no change in Labriola's health insurance

policies." (Exceptions Brf. at 7-8). This is wrong. Burch did not indicate that the Company would not change its health insurance policies at all. He simply indicated that the Company "would not agree to the Union's proposed health and welfare plan." (Report at 16). As the Hearing Officer correctly noted: "This does not foreclose bargaining or agreement on a different healthcare plan." (Report at 16).

The Union also argues that Burch's comments must be "viewed in context." It notes that (1) Labriola had rejected the Union's proposal to participate in the Union's health and welfare plan; (2) Burch asked employees in the course of his remarks whether the Union had delivered on its promises; (3) Burch told employees that the Company's most recent proposal at the bargaining table called for a decrease in wages and commissions; and (4) Burch said that, although the Company would bargain in good faith, the Union could not force it to agree to any proposal. (Exceptions Brf. at 8). The Union claims that these remarks, taken together, conveyed to employees that it would be "futile" to vote for the Union because "all they would get is what the union could restore them." (Exceptions Brf. at 9). As with the Union's creative interpretation of the phrase "legal workforce," there is no legal or factual basis supporting this theory.

As the Hearing Officer noted when she considered the totality of Burch's remarks, all of the remarks quoted by the Union are accurate statements of fact and law. (Report at 15-16). A Company may lawfully convey to employees the current status of the parties' proposals at the bargaining table. *United Technologies Corporation*, 274 NLRB 609, 610 (1985) ("The Board has interpreted this provision [Section 8(c)] to privilege noncoercive communication between an employer and its employees in the context of the collective-bargaining process. . . As a matter of settled law, Section 8(a)(5) does not, on a per se basis, preclude an employer from

communicating, in noncoercive terms, with employees during collective-bargaining negotiations."). As stated unequivocally in *United Technologies Corporation,* 274 NLRB 1069, 1074 (1985); "[A]n employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations." That is exactly what Burch did; he communicated the employer's position in collective-bargaining negotiations. This was not new information for employees. The Union repeatedly acknowledges in its Exceptions that the Company had, in fact, rejected the Union's health and welfare proposal at the bargaining table. (Exceptions Brf. at 2, 8). In fact, Noe Ornelas, the employee representative for the Union at the bargaining table, had conveyed this same information to employees in the course of bargaining:

> Q. Did Labriola respond in negotiations to the union proposal? . . what did Labriola say in response to the union proposal?
>
> A. Oh, they rejected it.
>
> Q. Did they say why?
>
> A. Well, the costs were too high.
>
> Q. And did anyone on the union bargaining team inform employees of how negotiations were progressing?
>
> A. Yes.
>
> Q. Who did?
>
> A. Myself.
>
> Q. And did you inform them of the progress on the insurance issue?
>
> A. Yes.

(Tr. 38).

It is similarly lawful for an employer to note that a Union cannot force a Company to agree to any particular proposal. Indeed, that is the nature of collective bargaining. In *Newburg*

Eggs, Inc., 357 NLRB No. 171 (2011), a case cited by the Hearing Officer, the Board overruled the Administrative Law Judge, finding that the Respondent had not expressed to employees that voting for union representation was futile and accordingly the comments were not objectionable. In that case, the employer stated in part: "[N]o one says how to manage the company, it is always the owner. He will be the only person that says . . . it's good for the company and good for the employees or not. If [the owner] decides that it's not good for the company or that the company is losing money, then he will be the only one who has the final say. . . Don't forget that negotiating is asking for something. It is all asking, so this is coming here and asking the company and the company always has the right to say yes or no." *Id.*

The Board found that such comments conveyed that the employer was "within its rights to bargain hard about mandatory subjects of bargaining, and would not necessarily have to accept the Union's proposals." *Id.* The Board determined that [s]uch expressions. . . do not suggest an intent not to negotiate in good faith with the Union; nor do they suggest that the outcome of negotiations would be foreordained." On that basis, the Board reversed the Judge's ruling that such comments were objectionable. *Id.*

Like the comments made in *Newburg Eggs,* Burch's comments conveyed that the Company had the right to bargain hard and had no obligation to accept the Union's proposals. Further, Burch was explicit in stating that the Company committed **to continue to bargain in good faith**, on that proposal and any others. (Co. Ex. 2). (emphasis added). *See also Alamo Rent-A-Car*, 338 NLRB 275, 276 (2002) (dismissing complaint allegation when there was not "the slightest suggestion that the Respondent would not negotiate in good faith with the Union about the various benefits mentioned or that the Union could not secure a different or better benefits package through bargaining.").

The Union likens Burch's comments to the comments at issue in *Plastronics, Inc.*, 233 NLRB 155 (1977), *Fisher Island Holdings, LLC*, 343 NLRB 190 (2004), and *Petrochem Insulation, Inc.*, 341 NLRB 473 (2004). None of these cases bear any relation to the present matter:

- In *Plastronics*, the employer told employees that, among other things, if they voted for the union, the employer would bargain from "scratch," and that they stood to lose the wages and benefits they already had; that, if the Union "got in" employees would "start from zero – no paid vacation, no paid holiday, absolutely nothing" and "wages would start at $2.30 per hour." 233 NLRB at 155. The Board found that these statements conveyed the impression that employees would lose their existing benefits during the course of negotiations, and that by making these statements the employer interfered with the election. *Id.* at 156.

- In *Fisher Island Holdings*, the employer informed employees that, while it had increased wages despite financial losses in the past, if employees supported the union, the employer would "absolutely reject any proposal that would cost more money." 343 NLRB at 190. The Board agreed with the ALJ that the "'prospective refusal to agree to any proposal that would cost more money' constituted a threat to withhold future pay raises that the Respondent would have otherwise granted in the absence of union representation, and further communicated to employees that unionization would be futile." *Id.*[3]

- In *Petrochem Insulation*, the employer indicated in a memorandum it did not want employees to vote for the union because it did not "want to lower your wages and benefits..." 341 NLRB at 473. The Board found that this statement "clearly implied to employees that if they successfully voted in the [union], the Employer would reduce their wages and benefits." *Id.*

As can be seen, in each of these cases, the threats of futility were explicit, and the employers in question were predicting what *would* happen if employees supported the unions in question. By contrast, Burch simply told employees what had *already happened* at the bargaining table; information about which employees were already well aware. As the Hearing Officer found, "Burch's remarks presented the Employer's position on the Union's proposal and

[3] Further, the Board's application for enforcement of its holding in *Fisher Island Holdings* was denied in *NLRB v. Fisher Island Holdings, LLC*, 140 Fed. Appx. 857 (11th Cir. 2005), in which the 11th Circuit found that the decision was not supported by substantial evidence.

conveyed its own proposal to employees." (Report at 16). Examined separately or as a whole, Burch's comments do not constitute unlawful conduct.

For all of the reasons stated above, the Board should reject the Union's Exceptions to Objection Number 3 and sustain the Hearing Officer's Report and recommendations.

V. CONCLUSION

For the reasons set forth above, the Union's Exceptions to the Hearing Officer's Report are without merit, and the election results should stand. In essence, the Union is trying to fit a square peg into a round hole. It likens this case to the several extreme examples of unlawful conduct described in the cases referenced above. However, there is simply no comparison to be made. In light of the foregoing, the Board should reject the Union's Exceptions and affirm the Hearing Officer's Report and recommendation that a Certification of Results issue.

Dated: July 1, 2013

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing has been filed with the National Labor Relations Board via the electronic filing system (www.nlrb.gov) on July 1, 2013. A copy of the foregoing has also been served, via electronic mail, on:

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